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U.S. Citizenship and Immigration Services

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[redacted]

File: WAC 03 143 53205 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in the investment business as well as the medical supply equipment business through a partially owned but separate entity. The petitioner claims that it is the subsidiary of ERV Electrical Construction Corporation, located in the Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States in 1999 and was subsequently granted a two-year extension of status. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's findings and notes that the director failed to provide any specific reasons to support his conclusions. The petitioner further asserts that the record contains sufficient evidence to establish that the beneficiary is employed in a managerial and executive capacity. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue raised in the director's decision is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. However, before turning to this issue, the AAO notes that the petitioner is seeking to establish the beneficiary's managerial and executive employment based on his role as president and chief executive officer of two separate entities, the petitioning company and its claimed subsidiary, a medical supply company. Therefore, the AAO must determine which entity serves as the beneficiary's actual employer, and must examine the relationship between the petitioner and its claimed subsidiary in order to determine whether it is proper to consider the beneficiary's employment within both companies for purposes of establishing his eligibility for the benefit sought. These additional issues, although not raised by the director, have a significant impact on the issue of whether the beneficiary would be employed by in a managerial or executive capacity with a qualifying organization under the extended petition. Thus, they will be given a full analysis in this decision. will be given a full analysis in this decision.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In its April 1, 2003 letter, submitted with the petition, the petitioner described the beneficiary's job duties as follows:

> In his position as President of [the petitioner], [the beneficiary] supervises and controls the operations of the entire company, including hiring and firing of personnel, directing business strategies and formulating financial plans for all business operations. [The beneficiary] establishes policies and overall operational guidelines and exercises wide latitude in personnel management. All financial reports and budget plans are subject to [the beneficiary's] review, and [the beneficiary] negotiates contracts with all suppliers and customers.
>
> Note that as President, [the beneficiary] also supervises and controls the work of the V.P. of Purchasing, Operations Manager and Billing Supervisor. The following is a breakdown of time spent on duties:
>
> | Duty | Time Spent |
> |---|---|
> | Supervises other managers | 35% |
> | Directs business strategies | 10% |
> | Formulates financial plans for all business operations | 15% |
> | Establishes policies and overall operational guidelines | 10% |
> | Exercises wide latitude in personnel management | 10% |
> | Review's [sic] financial reports and budget plans | 5% |
> | Negotiates contracts on behalf of the company | 15% |
>
> [The beneficiary] took on the active role of President and CEO of [the petitioner's subsidiary medical supply company] in April 2000. In this position, [the beneficiary] is responsible for the overall operations of the company, negotiates and engages the company in business contracts with suppliers and customers, exercises broad discretionary authority in policy formulation, personnel decisions, and overall management strategy.

The petitioner further explains that, because the medical supply company is the petitioner's biggest asset, the beneficiary is carrying out his explicit duties on behalf of the petitioner for its subsidiary, and that his assignment within the claimed subsidiary is "in the ordinary course of business" for the petitioner, an investment company. The petitioner indicated on the Form I-129 that it had eight employees, and submitted an organizational chart labeled as "ERV Organizational Chart" depicting eleven employees, including the beneficiary. It also submitted the medical supply company's W-2 forms for 2000 which reveal that all of the

employees depicted on the chart, including the beneficiary, are on the payroll of the petitioner's claimed subsidiary.

On May 28, 2003, the director requested additional evidence. Specifically, the director requested an organizational chart for the U.S. entity, to include the current names of all executives, managers, supervisors, and clearly identifying all employees under the beneficiary's supervision by name and job title. The director also requested a brief description of the job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision, as well as the source of remuneration for all employees.

In response, the petitioner submitted a new organizational chart which indicates that the beneficiary supervises eight employees: V.P. purchasing, operations manager, executive secretary, billing supervisor, sales agent, billing clerk/receptionist, maintenance delivery/supervisor and a technician. The petitioner provided a brief job description for all employees, but failed to specify their educational qualifications, annual salaries, immigration status and source of remuneration. The petitioner did not identify whether the employees included in the chart are employed by the petitioner or by its claimed subsidiary.

On November 14, 2003, the director denied the petition. The director noted that the record fails to indicate who is actually performing the tasks to provide a service or produce the product, and further notes that the job description provided by the petitioner describes the beneficiary's job duties in only vague and general terms. The director concluded that the beneficiary would be performing all aspects of the day-to-day operations of the company and therefore was not serving in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director failed to provide any specific reasons for the denial of the petition other than stating that the information provided is too general. Counsel further asserts that the director erred in finding that the beneficiary would not be serving in a managerial and executive capacity, and once again describes the beneficiary's duties with the foreign company, with the petitioning organization, and with the petitioner's claimed subsidiary, concluding that he has been and will continue to be employed in a managerial and executive capacity.

Upon reviewing the petition and the evidence the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. However, the AAO does not concur with the director's stated reasons for denying the petition or his analysis of the facts. Specifically, the AAO cannot find that the beneficiary is employed in a managerial or executive capacity because (1) the petitioner does not appear to be doing business; (2) the petitioner does not appear to actually employ the beneficiary; and (3) the petitioner has not established a qualifying relationship with its claimed subsidiary, which is evidently the beneficiary's actual employer.

As noted above, the evidence submitted with respect to the petitioning organization raises questions as to whether the petitioner is actually doing business, or whether it, in fact, employs the beneficiary. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines *doing business* as "the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent of office of the qualifying organization in the United States and abroad." The petitioner was established

in April 1999. The record includes the petitioner's Forms 1120, U.S. Corporation Income Tax Returns for 1999, 2000 and 2001. During these three years, the petitioner reported no income, paid no wages, paid no compensation to officers and had no inventory. Other than the petitioner's investment in the medical supply company in 1999 and two relatively small real estate investments in 2000, the company does not appear to have been engaged in any type of business transaction. As noted above, the record also indicates that the employees indicated on the petitioner's organizational chart, including the beneficiary, are employees of the medical supply company. Therefore, it does not appear that the petitioner has any employees. Based on the above, the petitioner has not established that it is engaged in the regular, systematic and continuous provision of goods and/or services as required by 8 C.F.R. § 214.2(l)(3)(i).

Given that the petitioner has not established that it is doing business, it would not appear to require or support an executive or managerial position. Accordingly, the beneficiary's described duties are not credible within the context of the nature of the organization, which appears to be only a shell company. It is not clear, for instance, how the beneficiary would exercise wide latitude in personnel management and negotiate contracts with suppliers and customers when the petitioner clearly does not have any personnel, customers or suppliers. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Although the petitioner suggests that the beneficiary divides his time between the petitioner and its claimed subsidiary, it is not clear what proportion of the beneficiary's time would reasonably be devoted to the management of a company with no employees and no business activities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Upon review of the record it appears that the beneficiary is in fact employed by the petitioner's claimed subsidiary and devotes most or all of his time to the medical supply company. Accordingly, the petitioner has not demonstrated that the U.S. company has employed or will employ the beneficiary in a qualifying managerial or executive capacity.

The AAO will next consider whether the beneficiary's employment with the petitioner's claimed subsidiary can be considered in determining whether the beneficiary qualifies as a nonimmigrant transferee under section 101(a)(15)(L) of the Act. The petitioner states that it purchased 50 percent of the medical supply company's stock in 1999 and that the beneficiary assumed an active role as the company's president and CEO in April 2000. The documents submitted show that the beneficiary received a Form W-2 from the medical supply company in 2000, and received no compensation from the petitioner between 1999 and 2001. The AAO will therefore assume that the beneficiary remained on the payroll of the medical supply company, a separate legal entity, at the time the petition was filed.

The regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) states that the petitioner "shall file an amended petition . . .to reflect changes in approved relationships. . . or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act." CIS has provided additional guidance as to when an amended petition is required, specifically noting that "[i]f an alien is transferred from one company to another company in the same organization and becomes the employee of the new company, an amended petition must be filed. This is the only way the Service will be able to ascertain if the new firm is related to the foreign firm in a qualifying capacity." Memorandum of [redacted], Executive Associate Commissioner, Operations,

Immigration and Naturalization Service, *Guidelines for the Filing of Amended H and L Petitions*, CO 214H-C/CO 214L-C (Oct. 22, 1992). In this case, the record suggests that the beneficiary became the employee of the medical supply company in April 2000 and therefore this company should have filed its own I-129 petition in order request authorization to employ the beneficiary as its president, accompanied by documentation of the medical supply company's relationship to the beneficiary's prior foreign employer. As the evident of record suggests that the beneficiary commenced employment with the medical supply company without the proper filing of an amended petition, then the beneficiary's duties with the medical supply company are not properly considered in this petition.

The petitioner and counsel assert, contrary to the evidence presented that the beneficiary is in fact an employee of the medical supply company, that the beneficiary serves as the medical supply company's president "*on behalf of* the petitioner," suggesting that the beneficiary remains the employee of the petitioning company. If the petitioner in fact employs the beneficiary, the duties of the beneficiary for the petitioner and on behalf of the petitioner's partially owned company could be viewed together. However, the petitioner must establish that the two companies are significantly interrelated; specifically, that they are part of the same organization. *See* Memorandum of James J. Hogan, Executive Associate Commissioner, Operations, Immigration and Naturalization Service, *Guidelines for the Filing of Amended H and L Petitions*, CO 214H-C/CO 214L-C (Oct. 22, 1992).

The statutory definitions of executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." The statutory definition of an organization would not ordinarily include a partially owned corporation that is an entity separate and distinct from the petitioning organization. However, the petitioner may provide evidence to establish that the petitioner and the petitioner's partially owned entity are either permanently or temporarily associated through controlling ownership, contract, or other legal means. Accordingly, a beneficiary's claimed managerial or executive duties that relate to the partially owned entity may be considered in certain instances for purposes of a nonimmigrant visa petition.

Here, the petitioner claims that the beneficiary works for the medical supply company, its claimed subsidiary, on behalf of the petitioner. Pursuant to 8 C.F.R. § 214.2(l)(ii)(K), *subsidiary* means:

> A firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner claims that it owns 50 percent of the medical supply company and is therefore required to provide documentary evidence not only of its ownership of half of the company, but also evidence that it in fact controls the company. With the initial petition, the petitioner submitted three of the medical supply

company's stock certificates, numbered 13 through 15, which were issued to the petitioning company as follows: (1) 2,000 shares issued on July 31, 1999; (2) 2,500 shares issued on August 6, 1999; and (3) 500 shares issued on July 31, 1999. All three stock certificates indicate that the medical supply company has authorized capital stock of 10,000 common shares; however, the petitioner did not explain why stock certificate number 14 was issued one week later than stock certificate number 15. No other documentation was submitted to establish the petitioner's claimed parent-subsidiary relationship with the medical supply company. However, the petitioner also submitted the medical supply company's Form 1120, U.S. Corporation Income Tax Return for 1999, which was prepared after the petitioner's acquisition of the company's stock. Schedules E and K of the medical supply company's Form 1120 indicate that Antonio Lizardo owned 55% of the company's stock at the end of the tax year. In addition, the petitioner submitted its Forms 1120 for the years 1999, 2000 and 2001. In each year, the petitioner indicated on Schedule K that the company did not own, directly or indirectly, 50 percent or more of the voting stock of a domestic corporation, and in each year, the petitioner indicated its stock in the medical supply company as an investment, rather than listing the company as a subsidiary.

Consequently, although the stock certificates submitted appear to show that the petitioner owns 50 percent of the medical supply company's stock, the other evidence discussed above suggests that the petitioner does not in fact own half of the company's stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As noted above, for the beneficiary's duties for this subsidiary company to be considered in the determination of the managerial or executive capacity, the petitioner must show either permanent or temporary association

through controlling ownership; otherwise the petitioner cannot effectively control the beneficiary's appointment to an executive or managerial position. The petitioner has not provided consistent evidence establishing that it maintains the claimed 50 percent ownership of the medical supply company's operations, or any evidence that it maintains control of the claimed subsidiary's operations. Therefore, the petitioner has not demonstrated that the beneficiary's duties for the medical supply company should be considered in this petition.

As discussed above, the petitioner has not demonstrated that it has employed or will employ the beneficiary in a primarily managerial capacity, or that it employed the beneficiary at all at the time the petition was filed. In addition as the director determined, the petitioner has not provided a comprehensive description of the beneficiary's duties for either the petitioner or the medical supply company. The petitioner's description of the beneficiary's duties borrows liberally from phrases found in the definitions of executive and managerial capacity. Statements indicating the beneficiary directs strategies, formulate plans, establishes policies and exercises wide latitude in personnel management do not convey an understanding of the beneficiary's day-to-day duties sufficient to establish eligibility. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the foregoing discussion, there is no evidence that the petitioner in fact employs the beneficiary, nor is there any evidence that the petitioner, which has no income, no employees and reports no business activity, could support a managerial or executive position, even if it does technically serve as the beneficiary's employer. In addition, the petitioner has not established that its claimed subsidiary, which appears to be the beneficiary's actual employer, is sufficiently related to the petitioner to establish that the beneficiary could manage the partially-owned company on behalf of the petitioner. Finally, if the beneficiary is employed directly by the petitioner's claimed subsidiary, the subsidiary company is required by regulation to file an amended petition on the beneficiary's behalf and the instant petition was improperly filed. In light of the confusing picture provided of the nature of the petitioner's business and the beneficiary's employment, it is not possible to determine from the record that the beneficiary will be engaged in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For these reasons, the petition cannot be approved.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G), as the petitioner has failed to establish that it is a qualifying organization engaged in the regular, systematic and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

> Is or will be doing business (engaging in international trade is not required) as an employer in the United States and at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee. . . .

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

> [T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

As noted above, the record includes the petitioner's Forms 1120, U.S. Corporation Income Tax Returns for the years 1999, 2000 and 2001. During this three-year period, the petitioner reported no income, paid no wages, paid no compensation to officers and had no inventory. The petitioner made an investment in the medical supply company in 1999 and two small real estate investments in 2000. Otherwise, it is evident that the company has not engaged in any business transactions and cannot be deemed to be involved in the regular, systematic and continuous provision of goods or services as contemplated by 8 C.F.R. § 214.2(l)(ii)(H). Thus, the AAO cannot conclude that the petitioner is a qualifying organization. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Therefore, the petition will be denied and the decision of the director will be affirmed.

ORDER: The appeal is dismissed.